



OFFICE OF THE ATTORNEY GENERAL OF TEXAS

AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable Weaver H. Baker, Chairman
Board of Control
Austin, Texas

*referred by
V-577 where
conflicts*

0-5187

Dear Sir:

Opinion No. 0-5187

Re: The authority of the
State Board of Control
to pay a contractor sums
expended by him to meet
the provisions of Article
5159a requiring that the
prevailing wage scale be
paid workmen engaged on
public works when through
mutual mistake of facts
the contract between the
Board of Control and the
contractor provides for a
lower rate of pay than
the prevailing scale;
and related questions.

We have your letter of July 8, 1943, enclosing letters from Moore Construction Company and John D. Reed, Commissioner, Board of Labor Statistics, together with your file pertaining to certain repairs and improvements made on the State Capitol Building. Said file, among other things, contained specifications on which bids were made to do the work above referred to, and the contract entered into between the Board of Control and Moore Construction Company.

Your letter and the enclosures enumerated revealed the following facts:

(1) The specifications made by you on which Moore Construction Company based its bid contained the following

Honorable Weaver H. Baker, page 2

provisions:

"LABOR REQUIREMENTS:

"The provisions of the prevailing wage law, H. B. No. 54, Chapter 45, Acts of the Regular Session of the Forty-third Legislature will be in effect on this contract. The stipulated prevailing rate of per Diem wages for this contract is:

<u>"Class</u>	<u>"Per hour</u>
" * * *	" * * *
" * * *	" * * *
"Plasterers	\$1.50
" * * *	
" * * *	

"The Contractor shall forfeit as a penalty to the State ten (\$10.00) dollars for such laborer, workman or mechanic employed, for each calendar day, or portion thereof, such laborer, workman, or mechanic is paid less than the said stipulated rates for any work done under said contract, by him, or by any subcontractor under him."

(2) By letter dated February 4, 1942, the local Plasterers' Union No. 783, notified the State Board of Labor Statistics that the prevailing rate of wages for journeymen plasterers would be increased from \$1.50 per hour to \$1.75 per hour on contracts entered into after April 12, 1942. The Local's letter stated that the \$1.50 rate had been maintained for four (4) years, but that increased living costs necessitated the raise. The letter was received by the Bureau of Labor Statistics on February 17, 1942. Local 783, affiliated with the American Federation of Labor, claims jurisdiction of

Honorable Weaver H. Baker, page 3

the following counties: Travis, Bastrop, Hays, Lampasas, Fayette, Lee, Blanco, Burnett, Caldwell, Williamson, Llano, San Saba, and Bell.

(3) On April 1st before the effective date of the above referred to increase, the Bureau of Labor Statistics contacted numerous contractors in the Austin area to determine if the increase was acceptable to them. All replies received to inquiries indicated the increased rate was acceptable and no replies were received to the contrary. Letters were received from a number of contractors whose names are set out in the letter from the Commissioner of the Bureau of Labor Statistics, that the increased rates were agreeable to them. However, Moore Construction Company doesn't appear on said list. After receiving the favorable replies to its inquiry, the Bureau of Labor Statistics corrected its file to reflect \$1.75 per hour as the prevailing wage scale for journeymen plasterers.

(4) Your letter stated that you failed to receive the notice mailed you by the Bureau of Labor Statistics as to the increased scale of pay of plasterers and you, therefore, set up the rate of \$1.50 in your specifications on the contract later awarded to Moore Construction Company.

(5) The letter from Moore Construction Company to you stated that it was not notified at any time prior to signing the contract May 22, 1942, by the Labor Board, the plasterers' representative, or any other agency, concerning the increased rate of pay of plasterers until May 25, 1942, when said fact was called to its attention by the plasterers' representative. After checking with the State Labor Board, Moore Construction Company paid said prevailing wage, and now requests the Board of Control to remunerate it for the increased amount paid plasterers under it above the amount set out in the specifications and contract, together with the additional cost of insurance required and a 10% profit on said increased amounts.

Under the above facts taken from your letter and enclosures, you propound to us three questions as follows:

"1. Under the facts herein submitted and as shown by the attached file, in the light of the law of this State, do we owe Moore Construction Company on room repairs to the State Capitol on above described contract, dated May 22, 1942, the sum of \$1609.10 for 6422 hours of labor for plasterers

Honorable Weaver H. Baker, page 4

paid an additional 25¢ per hour for work performed by them on said job over and above the \$1.50 per hour set out in the contract.

"2. Are we bound to pay for the item of insurance set out in such statement of \$225.27?

"3. Are we bound to pay the \$183.44 profit claimed by the Moore Construction Company in view of the facts and law above submitted?"

It is noted that both the specification for bids and the contract entered into with Moore Construction Company set out that the provisions of Article 5159a, Vernon's Annotated Civil Statutes, would be in effect on this contract. Article 5159a, V.A.C.S., provides as follows:

"Sec. 1. Not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the work is performed, and not less than the general prevailing rate of per diem wages for legal holiday and overtime work, shall be paid to all laborers, workmen and mechanics employed by or on behalf of the State of Texas, or by or on behalf of any county, city and county, city, town, district or other political subdivision of the State, engaged in the construction of public works, exclusive of maintenance work. Laborers, workmen and mechanics employed by contractors or subcontractors in the execution of any contract or contracts for public works with the State, or any officer or public body thereof, or in the execution of any contract or contracts for public works, with any county, city and county, city, town, district, or other political subdivision of this State, or any officer or public body thereof, shall be deemed to be employed upon public works.

"Sec. 2. The public body awarding any contract for public work on behalf of the State, or on behalf of any county, city and county, city, town, district or other political subdivision thereof, or otherwise undertaking any public work, shall ascertain the general prevailing rate of per diem wages in the locality in which the work is to be performed for

each craft or type of workman or mechanic needed to execute the contract, and shall specify in the call for bids for said contract, and in the contract itself, what the general prevailing rate of per diem wages in the said locality is for each craft or type of workman needed to execute the contract, also the prevailing rate for legal holiday and overtime work, and it shall be mandatory upon the contractor to whom the contract is awarded, and upon any subcontractor under him, to pay not less than the said specified rates to all laborers, workmen and mechanics employed by them in the execution of the contract. The contractor shall forfeit as a penalty to the State, county, city and county, city, town, district or other political subdivision on whose behalf the contract is made or awarded, Ten Dollars (\$10.00) for each laborer, workman, or mechanic employed, for each calendar day, or portion thereof, such laborer, workman or mechanic is paid less than the said stipulated rates for any work done under said contract, by him, or by any subcontractor under him, and the said public body awarding the contract shall cause to be inserted in the contract a stipulation to this effect. It shall be the duty of such public body awarding the contract, and its agents and officers, to take cognizance of complaints of all violations of the provisions of this Act committed in the course of the execution of the contract, and, when making payments to the contractor of monies becoming due under said contract, to withhold and retain therefrom all sums and amounts which shall have been forfeited pursuant to the herein said stipulation and the terms of this Act; provided, however, that no sum shall be so withheld, retained or forfeited, except from the final payment, without a full investigation by the awarding body. It shall be lawful for any contractor to withhold from any subcontractor under him sufficient sums to cover any penalties withheld from him by the awarding body on account of the said subcontractor's failure to comply with the terms of this Act, and if payment has already been made to him the contractor may recover from him the amount of the penalty or forfeiture in a suit at law.

"Sec. 3. The contractor and each subcontractor shall keep, or cause to be kept, an accurate record showing the names and occupations of all laborers,

Honorable Weaver H. Baker, page 6

workmen and mechanics employed by him, in connection with the said public work, and showing also the actual per diem wages paid to each of such workers, which record shall be open at all reasonable hours to the inspection of the public body awarding the contract, its officers and agents.

"Sec. 4. Any construction or repair work done under contract, and paid for in whole or in part out of public funds, other than work done directly by any public utility company pursuant to order of the Railroad Commission or other public authority, whether or not done under public supervision or direction, or paid for wholly or in part out of public funds, shall be held to be 'public works' within the meaning of this Act. The term 'locality in which the work is performed' shall be held to mean the county, city and county, city, town, district or other political subdivision of this State in which the building, highway, road, excavation, or other structure, project, development or improvement is situated in all cases in which the contract is awarded by the State, or any public body thereof, and shall be held to mean the limits of the county, city and county, city, town, district or other political subdivisions on whose behalf the contract is awarded in all other cases. The term 'general prevailing rate of per diem wages' shall be the rate determined upon as such rate by the public body awarding the contract, or authorizing the work, whose decision in the matter shall be final. Nothing in this Act, however, shall be construed to prohibit the payment to any laborer, workman or mechanic employed on any public work as aforesaid of more than the said general prevailing rate of wages."

Sections 5 and 6 of said Act being penal provisions are carried as Article 1581a of the Penal Code and provide as follows:

"Sec. 5. Any officer, agent or representative of the State, or any political subdivision, district or municipality thereof, who wilfully shall violate, or omit to comply with, any of the

provisions of this Act, and any contractor or subcontractor, or agent or representative thereof, doing public work as aforesaid, who shall neglect to keep, or cause to be kept, an accurate record of the names, occupation and actual wages paid to each laborer, workman and mechanic employed by him in connection with the said public work, or who shall refuse to allow access to same at any reasonable hour to any person authorized to inspect same under this Act, shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not exceeding Five Hundred Dollars (\$500.00), or by imprisonment for not exceeding six (6) months, or by both such fine and imprisonment, in the discretion of the Court.

"Sec. 6. If any section, sentence, clause or part of this Act is for any reason held to be unconstitutional such decision shall not affect the remaining portions of this Act. The Legislature hereby declares that it would have passed this Act, and each section, sentence, clause, or part thereof, irrespective of the fact that one or more sections, sentences, clauses or parts thereof be declared unconstitutional."

This Act has been construed by the Texas Courts in the following cases: Southern Prison Company v. Rennels, 110 S. W. (2d) 606; Austin Bridge Company v. Teague, 149 S. W. (2d) 674; and Austin Bridge Company v. Teague, 152 S. W. (2d) 1091, in which the Supreme Court reversed the judgment of the Court of Civil Appeals in the same case.

The above decisions are not helpful to us in this instance because they involve fact situations entirely different from those presented here.

In the Southern Prison Company case the public body awarding the work never made any determination of the prevailing wage scale for the type of work done by plaintiff.

In the Austin Bridge Company case there was a controversy as to whether the type of work done by the plaintiff was skilled or unskilled labor.

Honorable Weaver H. Baker, page 8

In the instant case, we are confronted by a mutual mistake of fact made by the State Board of Control and the Moore Construction Company as to the prevailing wage scale for plasterers.

The contract entered into between them set out that the provisions of House Bill 54, Chapter 45, Acts of the Regular Session of the Forty-third Legislature, (Article 5159a, V.A. C. S., and Article 1581a, Penal Code) would be in effect on the contract. Both parties to the contract were bound by said Act and Moore Construction Company paid the prevailing rate on ascertaining what it was.

It is elementary that where there is a mutual mistake of fact that a contract will be reformed to express the true intent of the parties, except when rights of third parties have intervened, and in some other instances not involved here.

The rule is stated in "RESTATEMENT OF THE LAW OF CONTRACTS," Vol. 2, page 968, Section 504, as follows:

"* * * where both parties have an identical intention as to the terms to be embodied in a proposed written conveyance, assignment, contract or discharge, and a writing executed by them is materially at variance with that intention, either party can get a decree that the writing shall be reformed so that it shall express the intention of the parties, if innocent third persons will not be unfairly affected thereby."

From the above, it is apparent that our answer to your first question is that the State Board of Control is authorized to pay Moore Construction Company the sum of \$1,609.10 being an additional twenty-five (25¢) cents per hour for 6422 hours of labor by plasterers, same having been paid said plasterers according to the letter from Moore Construction Company in addition to the \$1.50 per hour provided in the contract and said total payment of \$1.75 per hour being the recognized prevailing wage scale for plasterers in this vicinity.

Honorable Weaver H. Baker, page 9

The answer to your second question is controlled by the answer to the first question. The Board of Control is authorized to pay the amount of additional insurance paid by the contractor which was occasioned by said contractor paying the prevailing wage scale prescribed by law instead of the lower scale set out in the contract.

Our answer to your third question is that the Board of Control is not authorized to pay ten (10%) per cent profit on the two above referred to items, namely: the additional amount paid the plasterers and the additional insurance paid occasioned by the higher rate of pay, because the contract involved here was not a cost plus contract, no standards are set up in same to show how profits are to be arrived at, or even to show that the contractor expected to make a cash profit on this transaction.

Many times contracts are made without expectation of cash profit in order to keep regular workmen employed, to obtain future business, etc.

The items which we have held subject to payment here were paid by the contractor in compliance with State law. The item of ten per cent (10%) profit on said payments does not fall within this category.

Very truly yours,

ATTORNEY GENERAL OF TEXAS

By

E. R. Simmons
Assistant

RECEIVED JUL 21 1942
Gerald C. Mann
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